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NO. 313

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In The Supreme Court of The United States

OCTOBER TERM, 1958

CARL BEISTLINE,

Petitioner,

vs.

CITY OF SAN DIEGO AND
GENERAL DYNAMICS CORPORATION,

Respondents.

BRIEF OF RESPONDENTS GENERAL DYNAMICS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

		Page
I.	INTRODUCTION	2
	A. Opinions of the Court Below	2
	B. Statement of Case	2
II.	THE FIRST QUESTION IN THE PETITION MUST BE ANSWERED NO	2
III.	THE SECOND QUESTION POSED IN THE PETITION MUST BE ANSWERED NO	6
	A. Petitioner Has Failed as a Matter of Law to Allege Violation of the Constitution	6
	B. Property Acquired Pursuant to the Power of Eminent Domain May Be Put to a Private Use at a Later Time	9
IV.	IF CONDEMNATION PROCEEDINGS HAD BEEN COMPLETED PETITIONER WOULD NOT BE ENTITLED TO RELIEF	11
V.	AUTHORITIES CITED BY THE PETITIONER HAVE NO BEARING ON THE CASE AT BAR	14
VI.	CONCLUSION	14

TABLE OF AUTHORITIES CITED

Page

CASES

City of San Rafael vs. Wood, 301 P. 2d 421, 144 Cal. App. 2d 604 (1956) 8

Eckhoff vs. Forest Preservation District 36 N. E. 2d 245, 248; 377 Ill. 208 (1941) 7

Gully vs. The First National Bank in Meridian, 299 U. S. 109, 57 Sup. Ct. 96, 81 L. ed 72 (1936) 4, 5

Hempstead Warehouse Corp. vs. United States, 98 F. Supp. 572 (Ct. of Cls., 1941) 7, 8

Metropolitan Water District vs. Adams, 107 P. 2d 618; 16 Cal. 2d 676 (1940) 8, 9

People vs. Peninsula Title Guar. Co., 301 P. 2d 1, 47 Cal. 2d 29 (1956) 8

Rosecrans vs. William Lozier, Inc., 142 F. 2d 118 (8th Cir., 1944) 5

Teague vs. Brotherhood of Locomotive Firemen and Enginemen, 127 F. 2d 53 (6th Cir., 1942) 5

TABLE OF AUTHORITIES CITED
(Continued)

Page

CASES

Thiriot vs. Santa Clara Elementary School District, 275 P. 2d 833, 128 Cal. App. 2d 548 (1954) 9, 12

23 Tracts of Land vs. United States, 177 F. 2d 967, 969-970, (6th Cir., 1949) 7, 8, 9

CONSTITUTIONS

Constitution of the United States, Fourteenth Amendment 4, 5

STATUTES

Code of Civil Procedure, Section 1241 12

United States Code, Title 28, Section 1331 ... 3

TEXTBOOKS

17 California Jurisprudence 2d 637, Eminent Domain Section 63 8

35 Corpus Juris Secondum 930 7

2 Moore 2d Ed., 1630 7

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CITY OF SAN DIEGO AND
GENERAL DYNAMICS CORPORATION,

Respondents.

To the Honorable Earl Warren, Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents pray that the petition for a Writ of Certiorari to review the decision of the U. S. Court of Appeals for the 9th Circuit, entitled Carl Beistline, Appellate, vs. City of San Diego and General Dynamic Corporation, Appellees, be denied.

I

INTRODUCTION

A. Opinions of the Court Below

The opinion of the Court of Appeals has been reported at 256 F. 2d 421.

B. Statement of the Case

The case is correctly stated in the petition.

II

THE FIRST QUESTION IN THE PETITION MUST BE ANSWERED NO

The first question presented by the petition for certiorari is stated as follows:

> "Whether a complaint which alleges that a defendant Municipal Corporation as a political subdivision of one of the United States, acting under color of authority derived from such State, secured the transfer of real property from plaintiff under the false and fraudulent representation that such real property was to be used by the Municipal Corporation for a public purpose, states a cause of action of which the District Court of the United States has jurisdiction."

Whether a violation of the constitution has taken place is entirely immaterial to a correct decision of the case at bar. Therefore, this case is not one which "arises under the constitution, laws or treaties of the United States" as required by law. Title 28 U.S.C. Section 1331. Accordingly, the District Court is without jurisdiction to hear this case.

The petitioner entered into a settlement agreement with the City of San Diego in 1947, wherein he agreed to convey the property which is the subject of this suit. The petitioner is bound by this agreement unless for some reason it is invalid. Reasons alleged in the complaint are fraud, and duress. If these grounds are substantiated, and barring other valid objections, the petitioner would appear to be entitled to the return of his property and to damages.

If these grounds are not substantiated, petitioner is entitled to nothing. This is true even though it be assumed that the original condemnation action was to obtain property for a private or unconstitutional purpose. The subsequent agreement foreclosed all objections which might be raised in the original suit.

The theories stated by the appellant are based on the purely common law actions of fraud and duress. It is also stated that the City violated an implied condition that the property be used for a public purpose. Obviously, no authority need be cited for the proposition that proof of a violation of the Fourteenth Amendment is not essential for recovery to these actions. Instead it is clear that the question determinative of recovery under each cause is the effect of the City's actions upon the freedom of choice of plaintiff.

It is stated first that the plaintiff decided to convey the land to the City because of representations that the land would be used for airport purposes when in fact the City wanted the property for a private investment, and secondly, that the plaintiff sold the property to the City solely because of a threat of a condemnation suit. It is alleged that in doing the above acts, the City violated the Fourteenth Amendment. This is entirely immaterial. Of what possible importance can it be to recovery under the above mentioned common law theories that the City incidentally violated the United States Constitution. Why should the court be required to decide an issue which is unimportant to granting the relief prayed for?

The law applicable to this case has been well settled ever since the decision of the U.S. Supreme Court in Gully vs. The First National Bank in Meridian, 299 U.S. 109, 57 Sup. Ct. 96, 81 L. ed. 72 (1936). The excellent discussion by Mr. Justice Cardozo of the principles and authorities involved bears quoting at length.

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. (Citing cases) The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.

> "(Citing cases) A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (citing cases), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. (Citing cases) Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. (Citing cases)". (Emphasis supplied)

The rule in the Gully case, supra, has been followed in a great number of later cases. Rosecrans vs. William Lozier Inc., 142 F. 2d 118, (8th Cir., 1944); Teague vs. Brotherhood of Locomotive Firemen and Enginemen, 127 F. 2d 53 (6th Cir., 1942).

The foregoing leaves no doubt that a Federal question is presented for jurisdictional purposes only when its decision is essential for granting or denying the relief prayed for. Jurisdiction is present only when an interpretation of the Constitution in one matter would grant relief and in another would deny it. Since it is essential for the petitioner to rely upon the above mentioned common law theories for recovery in this case, the question of a constitutional violation is immaterial.

III

THE SECOND QUESTION POSED IN THE PETITION MUST BE ANSWERED NO

The petitioner poses the following as a second question presented for decision by the court.

> "Whether a complaint which alleges that a defendant Municipal corporation as a political subdivision of one of the United States, acting under color of authority derived from such State, secured the transfer of real property from plaintiff under its representation that such real property was to be used by the Municipal corporation for a public purpose, and has not used such real property for a public purpose, but conveyed it to a defendant corporation for industrial uses, states a cause of action of which the District Court of the United States has jurisdiction."

A. Petitioner Has Failed, as a Matter of Law, to Allege a Violation of the Constitution

It is apparent from reading the petition for certiorari including the above question that petitioner's contention as to the existence of a constitutional violation is grounded solely on the theory that there was an unlawful taking pursuant to the power of eminent domain. This statement is contained in the petition:

> "That the Constitution of the United States of America does prevent a State from taking a person's property for purposes of speculation is the

"gist of petitioner's contention "

It is equally apparent that any conduct which falls short of constituting an exercise of the power of eminent domain does not violate the constitution but at most will give rise to a civil remedy. Therefore, the question here is whether there was a "taking" of appellant's property.

This taking or exercise of power must appear in the complaint from well-pleaded facts. 2 Moore 2d Ed., 1630. The appellant merely alleges that negotiations took place between himself and city officials as to the sale of his property, and that a complaint for condemnation was subsequently filed in Superior Court. No other facts are alleged. It is well settled, both in California and elsewhere, that the foregoing acts by city officials do not amount to a taking of property. Eckhoff vs. Forest Preservation District, 36 N. E. 2d 245, 248, 377 Ill. 208 (1941); 23 Tracts of Land vs. U. S., 177 F. 2d 967 969-970 (6th Cir.., 1949); Hempstead Warehouse Corp. vs. U. S., 98 F. Supp. 572 (Ct. of Cls., 1941); 35 C. J. S. 930).

In the Eckhoff case, supra, the issue before the Supreme Court of Illinois was whether a question of the construction of certain constitutional provisions, including the Fourteenth Amendment to the United States Constitution, was before the court. The question was raised by a motion to strike the pleading. The court said:

> "It seems obvious that the taking or damaging of land by eminent domain is not accomplished by passing resolutions or ordinances, nor by

> "negotiating with the owner for the purchase of it, or serving notices upon him that the land may be required for public purpose.... Entering into negotiations for the purchase, and filing of a petition to condemn, vests no interest in land. (Citing cases)." (Emphasis supplied).

In 23 Tracts of Land, supra, the Sixth Circuit Court of Appeals made this statement:

> "The filing of a petition in condemnation without taking possession is not a taking. The condemnor may discontinue or abandon his effort."

In the Hempstead Warehouse case, supra, it was admitted by the plaintiff that the threat to condemn one's property does not constitute a taking of the property.

> "Plaintiff admits that the threat to condemn one's property does not constitute a taking, as well it must; . . . . ."

Under California law where an order of immediate possession is made before trial, a "taking" does not occur until the date of possession by the condemning authority. Metropolitan Water District vs. Adams, 107 P. 2d 618, 16 Cal. 2d 676 (1940); City of San Rafael vs. Wood, 301 P. 2d 421, 144 Cal. App. 604 (1956); People vs. Peninsula Title Guar. Co., 301 P. 2d 1, 47 Cal. 2d 29, (1956); 17 Cal. Jur. 2d 637; Em. Dom. Section 63.

The foregoing cases were correctly applied by the Court below in holding that there had been no taking in this case.

"A "taking" is accomplished by possession under an order for "vesting," Metropolitan Water District of So. Cal. v. Adams, 1940, 16 Cal. 2d 676, 107 P. 2d 618 or by payment of a final judgment in condemnation. 'The enactment of legislation which authorizes condemnation of property is not such a taking even though it may cause a change in the value of the property.' 23 Tracts of Land v. United States, 6 Cir., 1949, 177 F. 2d 967, 969-70. Appellant chose, by settlement, to avoid and not to force or endure any "taking" of his property. None is alleged, and none could be, under the facts of this case. Thiriot v. Santa Clara Elementary School District, 1954, 128 Cal. App. 2d 548, 275 P. 2d 833."

Certainly the above authorities reflect a fortiori that negotiations together with filing of the complaint in condemnation do not amount to a taking of the property under the power of eminent domain. Without the allegation of proof of an actual "taking", the matter of public or private use becomes immaterial, other than as related to actionable misrepresentations. The latter, of course, pertains only to a common law action of fraud. It is clear, therefore, that no violation of the Fourteenth Amendment has been alleged.

B. Property Acquired Pursuant to the Power of Eminent Domain May Be Put to a Private Use at a Later Time.

This question apparently assumes that no showing of a fraudulent intent as of the time of the sale to the City will be made. Instead, the question is whether the City, after obtaining the property, may thereafter fail

to use it for the intended purpose, and sell the property to a private concern without violating the constitutional rights of the petitioner. The answer to this question was succinctly stated in the opinion of the court below.

> "Because a soverign body plans to acquire private property for a lawful purpose (here an airport), does acquire the property with such purpose, and thereafter changes its corporate mind and uses the property for a different purpose, or even trades or sells the property to another, and at an increased price, does not thereby establish a taking for a private use, nor fraud, nor any fraudulent or false or untrue representations. Need for taking the particular land, like the issue of compensation for the taking, is judged solely by the conditions existing at the time of the taking. Reichelderfer v. Quinn, 1932, 287 U.S. 315, 323; Spinks v. City of Los Angeles, 220 Cal. 360, 31 P. 2d 193; Arechiga v. Housing Authority of the City of Los Angeles, ___A.C.A.___, decided April 24, 1958; 18 Am. Jur., Eminent Domain § 124, p. 768. (Cf. Ritzman v. City of Los Angeles, 1940, 38 Cal. App. 2d 470, 101 P. 2d 541.)"

IV

IF CONDEMNATION PROCEEDINGS HAD BEEN COMPLETED THE PETITIONER WOULD NOT BE ENTITLED TO RELIEF

As stated above, in 1947 the City of San Diego commenced a condemnation suit to obtain certain property, including the petitioner's, for the purpose of operating a municipal airport. The petitioner was named as a defendant in the suit, and accordingly had the opportunity to put in issue and litigate various questions, including the question of whether his property was to be taken for a public use. He chose not to do this, however, and after negotiations with City officials he settled his case out of court. As a part of this settlement, he voluntarily deeded his property to the City.

Since then, the property formerly owned by the petitioner has been sold to the respondent General Dynamics Corporation for a higher price than was originally paid in the settlement. Petitioner then commenced this action, alleging that his property had been obtained from him through fraud.

Under California law, it is clear that the present action, based upon false representations, is barred. An appellate decision has held under facts identical to those with the case at bar except that condemnation proceedings had been completed, that the former landowner was not entitled to relief, and, therefore, that a general demurrer had properly been sustained. This case is most interesting in view of the statement of the petitioner appearing in his opening brief filed in the

Circuit Court of Appeals:

> "In short, plaintiff contends that for the question with which we are here concerned there is no substantial distinction between the situation presented here and the case where the condemnation proceedings are completed and the value of the property taken is fixed by a jury. In both cases the property has been taken under compulsion of law." (Emphasis supplied).

In the case of Thiriot vs. Santa Clara Elementary School District, 275 P. 2d 833, 128 Cal. App. 2d 548 (1954), a school district had commenced an action of condemnation After the answer was filed, the case was settled with the landowner consenting to a judgment. In the later action as in the case at bar, the former landowner as plaintiff alleged that at the time of the earlier suit, the district and its officers had falsely represented that the land was to be used for school purposes and that he had settled the case on reliance upon these representations. The appellate court in ruling that the general demurrer had properly been sustained held that the fraud alleged was intrinsic, and, therefore, the judgment was not subject to attack. The court said:

> "Obviously, the alleged fraud pertained to one of the main issues in the condemnation suit. The applicable statute declares that before property may be taken in eminent domain 'it must appear: 1. That the use to which it is to be applied is a use authorized by law; 2. That the taking is necessary to such use . . . ' (Code Civ. Proc., Sec. 1241).

"The basic principle is that 'there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest.' Pico vs. Cohn (1891), 91 Cal. 129, 133-4, (25 P. 970, 27 P. 537, 25 Am. St. Rep. 159, 13 L.R.A. 336).)" (128 C. A. 2d at pages 549-50).

The case is also significant since it was not even contended that the conduct of the school district had violated the due process clause of Federal or State Constitutions.

V

AUTHORITIES CITED BY THE PETITIONER HAVE NO BEARING ON THE CASE AT BAR

The cases cited in the petition as being in conflict with the opinion of the court below are not applicable to the case at bar. The rule in each case assumes that a taking has occurred or is threatened. Each case asks for injunctive relief. Therefore, for these rules to be applicable to the case at bar, there must have been a taking, as clearly shown in part III, A of this brief, there has not been such a taking.

Furthermore, the case at bar, unlike the cited cases, can succeed only upon a showing of fraud or duress. Reference made to the discussion in part II of this brief. Without such a showing the sale of the property to the City would be valid and binding on the petitioner, regardless of any constitutional violation. Such violation if any occurred is entirely immaterial to recovery under such common law theories.

VI

CONCLUSION

From the foregoing argument and citation of authority, it must be concluded that the District Court has no jurisdiction to hear this case. The complaint does not allege facts constituting a violation of the Fourteenth Amendment. Even if it be assumed that such a violation is alleged, decision of such a question is entirely unnecessary to granting the relief prayed for.

It is therefore respectfully submitted that this Court must affirm the decision of the District Court and the Ninth Circuit Court of Appeals.

Dated September 25, 1857.

Respectfully submitted

LUCE, FORWARD,
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By FRED KUNZEL

The Respondent, The City of San Diego, joins in the foregoing brief.

Dated September 25, 1958.

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